



THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### The use of the charter and pre-trial detention in EU Law

**Citation for published version:**

Mancano, L 2021, 'The use of the charter and pre-trial detention in EU Law: Constraints and possibilities for better protection of the Right to Liberty', *European Papers*, vol. 6, no. 1, pp. 125-139.  
<https://doi.org/10.15166/2499-8249/457>

**Digital Object Identifier (DOI):**

[10.15166/2499-8249/457](https://doi.org/10.15166/2499-8249/457)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

European Papers

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.





INSIGHT

# THE USE OF THE CHARTER AND PRE-TRIAL DETENTION IN EU LAW: CONSTRAINTS AND POSSIBILITIES FOR BETTER PROTECTION OF THE RIGHT TO LIBERTY

LEANDRO MANCANO\*

**ABSTRACT:** As EU criminal law has expanded over the years, so have the opportunities for the application of relevant provisions of the EU Charter of Fundamental Rights. The present *Insight* analyses the situations where the right to liberty has become relevant to pre-trial detention in areas covered by EU rules. It critically discusses the gaps of protection existing in the current legal framework, and puts forward practical solutions to achieve better protection of the right to liberty.

**KEYWORDS:** mutual recognition – right to liberty – pre-trial detention – Charter of Fundamental Rights of the European Union – Court of Justice – EU criminal law.

## I. INTRODUCTION

The reach of European Union (EU) criminal law has been growing exponentially over the last two decades. The evolution of this area is a complex legal phenomenon, and has different (legal and extra-legal) roots. One of the main drivers has undoubtedly been the creation of the EU as an area without internal frontiers, of which the Area of Freedom Security and Justice (AFSJ) is a by-product.<sup>1</sup> The spaces and opportunities that a borderless area opened to criminal activities have called for a set of compensatory measures. Enhanced judicial cooperation is one of the founding pillars of the EU-wide reaction to the challenges posed by increased cross-border crime (and cross-border offenders).<sup>2</sup> As known, the Union has adopted mutual recognition as the cornerstone of judicial cooperation between Member States since the 1999 Tampere Council.<sup>3</sup> The principle entails that a

\* Senior Lecturer in EU Law, Edinburgh Law School, leandro.mancano@ed.ac.uk.

<sup>1</sup> The goal of creating an area of freedom security and justice in the EU was set by the Treaty of Amsterdam first, and is now enshrined in art. 3(2) TEU and Title V TFEU.

<sup>2</sup> V Mitsilegas, *EU Criminal Law* (Hart 2009) 5 ff.

<sup>3</sup> As known, mutual recognition in criminal matters is a principle borrowed from the law of the internal market, where it was introduced by the *Cassis de Dijon* judgment of the CJEU. case 120/78 *Rewev Bun-*



certain judicial decision issued by Member State "A" and addressed to Member State "B" must be recognised and executed by the latter without further formalities, unless grounds for refusal apply. Such automaticity builds on the principle of mutual trust, amounting to the presumption that – save in exceptional circumstances – Member States comply with fundamental rights.<sup>4</sup> The European Arrest Warrant Framework Decision (EAW FD) is the flagship of mutual recognition in criminal matters.<sup>5</sup>

The creation of a borderless area has triggered further legal integration in EU criminal justice not only for the purposes of fostering the effectiveness of law enforcement, but also to better protect suspects and accused persons. In this sense, we can identify two sets of rules. Both them rest on the awareness that the absence of internal frontiers may as well act at the expenses of (potential and convicted) wrongdoers. Being investigated, tried or sentenced in a state other than that of one's own nationality or habitual residence has significant drawbacks: the chances of being granted pre- or post-trial alternatives to detention are lower, and the pursuit of social reintegration is harder.<sup>6</sup>

On that basis, a series of Directives and Framework Decisions have been adopted over the last 10 years or so. On the one hand, there are the so called "trust-enhancing" measures.<sup>7</sup> These are EU legislative instruments adopted to introduce common minimum rules on certain aspects of important procedural safeguards. They apply to (purely internal) criminal proceedings and (in some cases) to EAW procedures, and concern particularly important rights such as the right to interpretation and translation, the right to information, the right to access to a lawyer and the right to be present at one's own trial.<sup>8</sup> By creating a level playing-field on key individual rights, these rules aim to make the presumption of mutual trust a credible reflection of an actual state of things, rather

*desmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42; KA Armstrong 'Mutual Recognition' in C Barnard and J Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, (Hart 2002) 225.

<sup>4</sup> The principle underpins the whole area of freedom, security and justice. See Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 191-192.

<sup>5</sup> Framework Decision 584/2002/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>6</sup> See European Union Council Doc 11457/09 of 1 July 2009, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings data.consilium.europa.eu; Draft Resolution 12116/09 of the Council of 15 July 2009 on the Proposal for Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings.

<sup>7</sup> K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) CMLRev 805, 811.

<sup>8</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

than a leap of faith. Thereby, they seek to improve and smoothen the functioning of judicial cooperation even further.<sup>9</sup> On the other hand, mutual recognition has been used by the EU legislature (at least in part) to pursue better individual protection. This has resulted in the enactment of provisions meant to facilitate the person's access to less restrictive measures than deprivation of liberty.<sup>10</sup>

Such development has occurred in the context of significant constitutional changes in the EU. First and foremost, the EU Charter of Fundamental Rights (CFREU or the Charter) has been elevated by the Lisbon Treaty to the ranks of primary law, on par with the EU Treaties.<sup>11</sup> Secondly, most of the safeguarding measures mentioned above were adopted post-Lisbon and therefore in form of Directives rather than Framework Decisions. The difference is not an immaterial one, since these Directives – or some of their provisions – might have direct effect and therefore create individual rights directly enforceable by national courts.<sup>12</sup>

The combination of these intertwined legal plots is particularly important for the topic of pre-trial detention in the EU. For the purposes of this *Insight*, “pre-trial detention” is understood as any form of deprivation of liberty ordered and enforced in the context of criminal proceedings before beginning of the trial. This includes purely internal situations and cross-border procedures of mutual recognition. The expansion of EU criminal law and the legally-binding value of the Charter entail that the right to liberty – stated in art. 6 CFREU – might be relied on in an increasing number of scenarios concerning pre-trial detention. This *Insight* addresses what these scenarios might be. It starts with outlining the definition of deprivation of liberty in EU law. Thereafter, it considers the specific situations that might fall under the protective umbrella of art. 6 CFREU. Two macro-areas are identified here: purely internal and cross-border situations. The *Insight* argues that the concept of pre-trial detention has been expanding but the use of the Charter is limited by the constitutional constraints related to its scope of application. Furthermore, the *Insight* indicates legal avenues to use the Charter and increase the protection of the right to liberty in mutual recognition procedures.

## II. DEFINING DEPRIVATION OF LIBERTY IN EU LAW

Since the present *Insight* discusses the possible uses of art. 6 CFREU in the context of pre-trial detention, it is most appropriate to begin the analysis with consideration of the right

<sup>9</sup> Art. 82 TFEU, the legal basis that empowers the Union to adopt minimum rules on individual rights in criminal procedures, requires that these rules be adopted to the extent they are necessary to facilitate mutual recognition.

<sup>10</sup> Framework Decision 2009/829 cit.

<sup>11</sup> Art. 6 TEU.

<sup>12</sup> According to the relevant provision of the Treaty of Amsterdam, it was explicitly established that Framework Decisions shall not have direct effect.

to liberty. According to the Explanation to the Charter, the right to liberty in EU law has the same meaning and scope as the corresponding provision of the European Convention of Human Rights (ECHR), that is art. 5 thereof. The right to liberty is a fundamental protection against arbitrariness, expressed through the prohibition to detain anybody unless in the cases and according to the procedures established by the law.

This warrants a first question: is there a definition of deprivation of liberty in EU law? There is, indeed, a plurality of definitions, emerging from different corners of EU law. In the context of art. 26 EAW FD,<sup>13</sup> the EU Court of Justice (CJEU or the Court) has interpreted *deprivation of liberty* as an autonomous concept of EU law. By drawing inspiration from the European Court of Human Rights (ECtHR) understanding of the right to liberty, the CJEU found that deprivation of liberty must be defined by looking at the concrete situation of the person concerned, account being taken of factors such as the nature of the restriction, its duration, effects, manner of implementation and the severity of the measure.<sup>14</sup> More prescriptively, in EU asylum law detention is defined as "confinement of an applicant [for international protection] within a particular place", where the applicant is deprived of his or her freedom of movement,<sup>15</sup> is isolated from the rest of the population, remains permanently within a restricted and closed perimeter, and is not allowed to leave at will.<sup>16</sup>

These two findings are not incompatible with each other. They both point to the importance of looking at the substance of a measure, rather than the way in which it is labelled at national or EU law level. There exist two main groups of safeguards attached to the right to liberty. On the one hand, there are general guarantees applying to all kinds of deprivation of liberty. These are, especially: legal certainty concerning the basis for detention and procedures governing its order and enforcement;<sup>17</sup> the right to be informed promptly of the reasons for arrest and charges;<sup>18</sup> the right to speedy judicial review after arrest or detention<sup>19</sup> and the right to release if the detention is not lawful;<sup>20</sup>

<sup>13</sup> The provision states that "[t]he issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed".

<sup>14</sup> Case C-294/16 PPU JZ ECLI:EU:C:2016:610, para. 47.

<sup>15</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), art. 2(1)(h).

<sup>16</sup> Joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367 paras 216-223. In this specific case, it was considered that measures such as a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, so restrictive as to give rise to a deprivation of liberty and to be classified as "detention".

<sup>17</sup> Art. 5(1) ECHR.

<sup>18</sup> *Ibid.* art. 5(2).

<sup>19</sup> *Ibid.* art. 5(3).

<sup>20</sup> *Ibid.* art. 5(4).

the right to compensation for unlawful detention;<sup>21</sup> right to be tried in a reasonable time or to be released pending trial (with conditions possibly attached thereto).<sup>22</sup> On the other, the interpretation of each ground of deprivation of liberty has developed around its own specific characteristics.

In terms of grounds for detention, these are exhaustively listed in art. 5(1) ECHR. The existing provisions of EU criminal law fall into two main categories: the lawful arrest or detention of a person effected for the purpose of bringing them before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent them committing an offence or fleeing after having done so;<sup>23</sup> and the lawful arrest or detention of a person against whom action is being taken with a view to extradition.<sup>24</sup> The latter is particularly relevant for judicial cooperation and EAW procedures, whereas the former has come into play more recently following the adoption of the procedural rights directives.

Transposed from the ECHR into the Charter, the meaning and scope of the right to liberty lives next to other coordinating provisions, organising the interpretation and application of the CFREU in the specific context of the EU legal order. Firstly, the CFREU applies to Member States when they are implementing EU law, in accordance with the Union's and States' respective powers and without extending the field of application of Union law beyond the powers of the Union or establishing any new power or task for the Union, or modifying powers and tasks as defined in the Treaties.<sup>25</sup> Secondly, the restrictions of the rights provided for in the Charter must comply with the principle of proportionality.<sup>26</sup> Thirdly, the EU standards should not go below those established by the ECHR.<sup>27</sup>

The provisions of the ECHR and their interpretation must be adjusted to the specific features of the Union working framework. This includes the shape and form of EU judicial cooperation based on mutual recognition. For example, the ECtHR's case-law on extradition pursuant to art. 5(1)(f) is certainly important for interpreting the right to liberty in the context of the EAW. However, that is only a starting point. The CJEU has consistently stated that the EAW has the objective of replacing "the multilateral system of extradition [...] with a system of surrender between judicial authorities [...] based on the principle of mutual recognition".<sup>28</sup> Furthermore, the way in which the Charter can be

<sup>21</sup> *Ibid.* art. 5(5).

<sup>22</sup> *Ibid.* arts 5(4) and 5(3).

<sup>23</sup> *Ibid.* art. 5(1)(c).

<sup>24</sup> *Ibid.* art. 5(1)(f).

<sup>25</sup> Art. 51(1) of the Charter of Fundamental Rights of the European Union [2012].

<sup>26</sup> *Ibid.* art. 52(1).

<sup>27</sup> *Ibid.* art. 52(3).

<sup>28</sup> Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198 para. 75.

used to review – for example – Member States’ actions depend on the constraints to its scope of application.

The question about the scope of application of the Charter is of the utmost importance, as it logically precedes the considerations in terms of proportionality and standard of protection. The fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.<sup>29</sup> The question is, therefore, whether national rules are to be regarded as implementing a measure of EU law for the purposes of art. 51(1). The fact that certain national rules fall into an area in which, broadly speaking, the EU has powers, cannot alone “bring those measures within the scope of EU law, and, therefore, cannot render the Charter applicable”.<sup>30</sup> This is especially the case in an area of shared competences,<sup>31</sup> such is the case of the area of freedom security and justice.<sup>32</sup> In that context, domestic measures providing for more favourable rules outside the framework established by a directive are not capable of affecting or limiting the minimum protection thus guaranteed under EU law,<sup>33</sup> nor are those rules “capable of infringing other provisions of that directive, or adversely affecting its coherence or the objectives pursued thereby”.<sup>34</sup> Furthermore, if EU law does not govern an aspect of a certain situation, a national rule falling into that latter situation lies outside the scope of the Charter. As a result, that rule cannot be reviewed in light of the CFREU.<sup>35</sup>

The following sections address the two main scenarios of the *Insight*. Firstly, the role of the Charter is discussed with regards to purely internal situations: namely, those related to the procedural safeguards’ directives. Judicial cooperation is the focus of the second scenario.

### III. THE RIGHT TO LIBERTY AND PRE-TRIAL DETENTION IN PURELY INTERNAL SITUATIONS

This part revolves around the possible use of the Charter to protect the right to liberty in purely internal situations. These situations have been attracted under the “umbrella” of EU law via the adoption of a series of directives on procedural safeguards in criminal proceedings. The concrete ways in which the Charter can be relied on to enhance protection of the right to liberty depends primarily on one question: is the Charter applicable at all? As shown below, that will be the case if there exists a sufficient link between the situation for which the protection of art. 6 CFREU is sought and the scope of appli-

<sup>29</sup> Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871 paras 52-53.

<sup>30</sup> Case C-198/13 *Julián Hernández and Others* ECLI:EU:C:2014:2055 para. 36.

<sup>31</sup> Joined cases C-609/17 and C-610/17 *TSNE* ECLI:EU:C:2019:981 para. 47.

<sup>32</sup> Art. 4(2)(j) TFEU.

<sup>33</sup> *Julián Hernández and Others* cit. para. 43.

<sup>34</sup> *TSN* cit. para. 51.

<sup>35</sup> Case C-243/16 *Miravittles Ciurana and Others* ECLI:EU:C:2017:969 para. 34; case C-152/17 *Consorzio Italian Management e Catania Multiservizi* ECLI:EU:C:2018:264 paras 34 and 35.

cation of EU law. The two sub-sections address the scenarios where (section III.1) that connection is established quite clearly by EU secondary law, and scenarios where (section III.2) that link is absent. It is submitted that the scope of application of the Charter limits the extent of the CJEU's scrutiny over national measures potentially incompatible with the right to liberty.

### III.1. MEASURES OF SECONDARY EU LAW EXPRESSION OF THE RIGHT TO LIBERTY

Among the procedural rights directive, there are different provisions that are directly connected to the safeguards enshrined by the right to liberty. Suspects or accused persons must be informed promptly of their right and their accusation.<sup>36</sup> The person deprived of liberty should be provided with a letter of rights containing basic information in a language they understand or, if that is not available in writing, understandable information should be provided orally.<sup>37</sup> The person must have the right to challenge the possible failure or refusal of the competent authorities to provide information in accordance with the Directive.<sup>38</sup>

A written translation of any decision depriving them of their liberty must be provided.<sup>39</sup> Until the person is proven guilty, any judicial decisions – including those on deprivation of liberty – must not refer to the person as such. This is without prejudice to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.<sup>40</sup> This would be the case of pre-trial detention, for example.

The Directives also feature a non-regression clause, pursuant to which “Nothing in this Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection”.<sup>41</sup>

In terms of use of art. 6 CFREU and pre-trial detention, the Directives might play a not insignificant role. While they do not give effect to every aspect of the right to liberty under art. 5 ECHR, they certainly translate at least certain important components thereof into secondary EU law. One of the legal implications following from this development is that Member States' laws and practices departing from those provisions or jeopardising their effectiveness, would be amenable to be reviewed by the CJEU. The Court's interpretation

<sup>36</sup> Art. 3 Directive 2012/13 cit.

<sup>37</sup> *Ibid.* arts 4 and 6.

<sup>38</sup> *Ibid.* art. 8(2).

<sup>39</sup> Art. 3 Directive 2010/64 cit.

<sup>40</sup> Art. 4 Directive 2016/343 cit.

<sup>41</sup> *Ibid.* art. 13; art. 8 Directive 2010/64 cit.



would be orientated by the right to liberty, and would probably start from the standard set by the ECtHR that is relevant to the situation under consideration.

While this would be the case for situations where the Member States are clearly implementing the specific provisions of the Directive mentioned above that are connected to the right to liberty, there are of provisions in these measures of secondary EU law that are not direct expression of the right to liberty, but are somehow connected to the latter. In such a scenario, the potential borne by art. 6 CFREU would be considerably limited by the rules on the scope of application of the Charter. We are talking about situations where there is not a clear and direct link of a national provision to the implemented EU rule and, as a result, to the Charter. In other words, the state might not be implementing that specific provision of EU law, but it would be acting in the broader scope of application of that measure.

### III.2. SECONDARY EU LAW, THE CHARTER AND THE INDIRECT LINK WITH NATIONAL PROVISIONS

There exists a grey area where the connection between national law, secondary EU law provisions and the Charter might exist, but is tenuous. The *Milev* judgment offers a perfect example.<sup>42</sup> The case involved the compatibility of Bulgarian legislation and case law with the Presumption of Innocence Directive. The former allowed a judge to make a decision on pre-trial detention on the basis of *prima facie* rather than detailed knowledge of the evidence that the person had committed an offence, and without the need to compare the incriminating and exculpatory evidence. While the questions focused on the compliance of the national law with the Directive<sup>43</sup> and arts 47 and 48 of the Charter, the Advocate General (AG) built considerations of the right to liberty into his Opinion.

The AG found an inseparable link between the right to liberty and the presumption of innocence, and posited that pre-trial detention could be justified only if there were specific indications that, notwithstanding the presumption of innocence, considerations of public interest outweighed the rule of respect for individual liberty.<sup>44</sup> On that basis, it was concluded that arts 6 and 48 CFR and the Directive must be interpreted as meaning that where an accused person submits exculpatory evidence that does not appear implausible or frivolous, the judge examining an appeal against the person's pre-trial detention must take that evidence into account, together with the incriminating evidence,

<sup>42</sup> Case C-310/18 PPU *Milev* ECLI:EU:C:2018:732.

<sup>43</sup> In particular, arts 3, 4(1) and 10 Directive 2012/13 cit.

<sup>44</sup> The AG referred to the requirement, established in the case-law of the ECtHR, that detention on remand be ordered if there exists a reasonable and persistent suspicion that the arrested person has committed an offence (ECtHR *McKay v United Kingdom* App n. 543/03, [3 October 2006] para. 40), and that art. 5(4) ECHR requires the national judge to address any concrete facts invoked by the detainee that cast doubt on the lawfulness of the deprivation of liberty (ECtHR *Nikolova v Bulgaria* App n. 31195/96 [25 March 1999] para. 61).

in assessing whether that person can reasonably be suspected of having committed the offence at issue.<sup>45</sup>

In the judgment, the CJEU did not touch upon the right to liberty. The Court found that the Directive confined itself to establishing common minimum rules for protecting the procedural rights of suspects and accused persons. According to the Court, the directive did not preclude the adoption of preliminary decisions of a procedural nature, provided that such decisions did not refer to the person in custody as guilty. Moreover, matters relating to the circumstances in which a decision on pre-trial detention could be adopted *were not governed* by that directive but were rather the preserve of national law (emphasis added).<sup>46</sup>

The same conclusion was reached by the Court with regards to the allocation of the standard of proof in the context of decisions on pre-trial detention. The Directive – and art. 6 specifically – “governs the allocation of the burden of proof as to the finding of guilt, and does not apply to the procedure leading to the adoption of [a decision on pre-trial detention], so that the allocation of the burden of proof in the context of that procedure is solely within the remit of national law”. Similar considerations apply to aspects such as the degree of certainty that the national court must have concerning the perpetrator of the offence, the rules governing examination of various forms of evidence, and the extent of the statement of reasons that that court is required to provide in response to arguments made before. These are all issues not governed by EU law. Therefore, the provisions of the Charter do not apply to those national rules.<sup>47</sup>

Analysing the application of the Charter to EU criminal law shows very clearly the full constraining force of the use of minimum rules.<sup>48</sup> The dynamic described in this section resonates with the broader debate on the blurred contours of the scope of the application of the Charter, notably in cases of partial (or minimum) harmonisation of a given matter.<sup>49</sup> It is difficult to argue against the Court’s finding that the national rules at stake in these cases were not governed by the Directive. There are, nonetheless, systemic implications that should not be overlooked. Such a hiatus created by the EU legislation – and inevitably confirmed in the case law – risks resulting in fragmentation at national level: on the one hand, there are bits of national procedures that must be in line with EU standards; on the other, there are areas that escape the scrutiny of the CJEU completely, despite the two groups of rules being connected. The non-regression clause – both in the

<sup>45</sup> See case C-310/18 PPU *Milev* ECLI:EU:C:2018:645, opinion of AG Wathelet, paras 61-88.

<sup>46</sup> See *Milev* cit. paras 48-49.

<sup>47</sup> Case C-653/19 PPU *Spetsializirana prokuratura* ECLI:EU:C:2019:1024 paras 30 and 41.

<sup>48</sup> Arts 82 and 83 TFEU confer legislative competences upon the EU in procedural and substantive criminal law, on the conditions that – inter alia – the Union legislature limits itself to the enactment of minimum rules.

<sup>49</sup> See, among many, F Fontanelli and A Arena, ‘The Harmonization potential of the Charter of Fundamental Rights of the European Union’ (2018) *European Journal of Law Reform* 56.

Charter and the Directives – is of little help too, as it would follow from the CJEU's reasoning that the clause does not apply because the national rules are not governed by EU law anyway – in other words, there is nothing to derogate or regress from. Increased awareness of the Court's approach (at least as it stands at present) might however re-orient the litigation strategies of defence lawyers at national level, who might find better if slower fortune in pursuing the ECtHR avenue instead of the CJEU.

Unsurprising as it might seem, what stands out in the judgments discussed above is the lack of any references to – or cursory consideration of – the possible adverse effects that those national rules might have had on the Directive's coherence and objectives.<sup>50</sup> It might have not changed the judgment's conclusion, and this neat distinction between what can be subject to judicial review has the apparent benefit of brining certainty in an area – the scope of application of the Charter – that has been for years in the spotlight precisely for its lack of clarity. Conversely, it is submitted that a systemic and purposive approach has the potential to expand the scope of the review of national measures in light of the Charter beyond the existing in a more nuanced without necessarily undermining that clarity.

#### IV. THE RIGHT TO LIBERTY AND PRE-TRIAL DETENTION IN CROSS-BORDER SCENARIOS

This part revolves around the use of the Charter and pre-trial detention in cross-border situations, namely mutual recognition procedures. Firstly, the discussion focuses on general principles concerning the use of art. 6 CFREU to orient the national court's interpretation. Secondly, the possible role for the Charter in opposing recognition and execution of the judicial decision under considerations is considered.

##### IV.1. GENERAL PRINCIPLES ON THE RIGHT TO LIBERTY AND EAW PROCEDURES

The use of the art. 6 CFREU in the context of EAW procedures has developed mostly in cases of disruption to the physiological unfolding of the mechanism. In this sense, the Court has established a series of principles concerning the role for the right to liberty to address “hiccups” to recognition and surrender. Prolonged detention can happen especially due to: the impossibility to carry out surrender by the time-limits provided for in the EAW FD due to circumstances beyond the state's control; risk of fundamental rights violation in the issuing state; surrender to the issuing state on the basis on an invalid EAW.

Arts 17 and 15 EAW FD establish procedures and time limits for the decision on the execution of an EAW, while art. 12 provides the executing judge with the possibility of ordering the provisional release of the requested person. Art. 23 EAW FD states that if timely surrender is prevented by circumstances beyond the control of any Member

<sup>50</sup> See *TSN* cit.

State, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. The FD makes clear that the surrender must take place within ten days of the new date agreed, and that the requested person must be released if and when the new time limit expires.

In case the first deadline for surrender is not met,<sup>51</sup> the expiry of those time-limits does not trigger an automatic right to release.<sup>52</sup> However, art. 1(3) requires the EAW FD to be interpreted in conformity with arts 6 and 52 CFREU. The right to liberty entails that the procedures for the execution have to be carried out with due diligence. The executing judge is required to consider factors such as the Member State authorities' failure to act; whether the requested person bears any responsibility for the delay; the sentence potentially faced by the requested person; the potential risk of that person absconding; and whether the requested person has been held in custody for a period that greatly exceeded the time limits stipulated in art. 17. Were the court to find that release is warranted, measures should be adopted to ensure that the material conditions necessary to proceed with the surrender remain fulfilled.<sup>53</sup> The obligation to release the person is not triggered even if the second date for surrender has expired and this is prevented by circumstances beyond the Member State's control.<sup>54</sup> This is, however, without prejudice to the executing authority's discretion as per art. 12 EAW FD.<sup>55</sup>

Not only the expiry of the FD time limits does not trigger a right to release. The FD precludes a national provision imposing a general and unconditional obligation to release a person after ninety days where there is a very serious risk of flight and that risk cannot be reduced to an acceptable level through appropriate measures. Nonetheless, art. 6 CFREU precludes national case law allowing for detention beyond that ninety-day period on the ground that the period was interrupted if the executing authority refers a question to the CJEU for a preliminary ruling, or is waiting for the Court to reply to a request for a preliminary ruling made by another executing authority, or if the executing authority postpones the decision on surrender on account of a real risk of inhuman or degrading detention conditions in the issuing Member State.<sup>56</sup>

Related to this very last example is the second case of prolonged detention in the executing state, which can materialise where the executing judge believes there is a risk that the person will suffer fundamental rights violation if surrendered to the issuing state. To make a decision on whether to refuse surrender, the executing authority must carry out a two-step test, which may require obtaining additional information from the

<sup>51</sup> See arts 15 and 17 EAW FD.

<sup>52</sup> Case C-237/15 PPU *Lanigan* ECLI:EU:C:2015:474 para. 50.

<sup>53</sup> *Ibid.* paras 53 ff.

<sup>54</sup> Case C-640/15 *Vilkas* ECLI:EU:C:2017:39 para. 74.

<sup>55</sup> *Ibid.* para. 42.

<sup>56</sup> Case C-492/18 PPU *TC* ECLI:EU:C:2019:108 para. 77.

issuing authority.<sup>57</sup> Meanwhile, the detention of the person can be extended provided that that measure is proportionate, with regard being had to the presumption of innocence and their right to liberty.<sup>58</sup> If, after an examination of the available information – including that provided by the issuing state – the real risk cannot be discounted, the executing judge must refrain from executing the EAW.<sup>59</sup> Once a decision of non-execution has been made by the executing judge, the release of the person should logically follow unless alternative jurisdictions to the issuing state can and are willing to undertake the prosecution/enforcement.

The third scenario concerns the situation where a person was surrendered on the basis of an invalid EAW. Such is the case when e.g. the EAW was not based on a national arrest warrant or other enforceable decision.<sup>60</sup> A finding by the national court of the issuing state that the EAW was issued in the absence of a national arrest warrant and was therefore invalid, does not trigger an automatic obligation to release the person placed in provisional detention after surrender to the issuing state. It is for the referring court to decide, in line with its national law, what impact the absence of such a national warrant has on the decision to hold the person in detention.<sup>61</sup>

Against that background, it is clear that the executing judge has an obligation to interpret the EAW in conformity with arts 6 and 52 CFR. The expiry of the deadline does not trigger a right to be released, nor does the detention clock stop ticking in the event of an exchange of information between judicial authorities – including information to ascertain the risk of possible inhuman treatment in the issuing state. Detention should not be prolonged excessively, although it is lawful when execution of the EAW is prevented by circumstances beyond the Member State's control. Two interrelated features to the use of art. 6 CFREU in the context of pre-trial detention pending mutual recognition procedures should be highlighted: the refusal to acknowledge an automatic right to release, and the use role for the right to liberty in orienting the interpretation of national authorities in situations of prolonged detention.

The FD lays down the time limits for recognition and rules on extension to the latter, rather than deadline for the maximum length of detention. It makes sense, therefore, that the expiry of the FD deadlines is not considered as an automatic trigger of release. Less straightforward is the interpretation of art. 23 FD, where the Court stretches considerably the meaning of that provision. On the one hand, the wording of the provisions is overlooked: the expiry of the new deadline agreed *does* trigger the obligation to release. On the other, this is justified on grounds that circumstances beyond the state's

<sup>57</sup> *Aranyosi and Căldăraru* cit. paras 89-97.

<sup>58</sup> *Ibid.* paras 98-101.

<sup>59</sup> *Ibid.* para. 101.

<sup>60</sup> This legal requirement is provided for in art. 8(1)(c) Decision 584/2002 cit.

<sup>61</sup> Case C-414/20 PPU *MM* ECLI:EU:C:2021:4 para. 82.

control materialised, where in fact those circumstances constituted a repetition of the situation that had impeded the surrender in the first place.

Standing that lack of right to release in situations of prolonged detention, the right to liberty serves to guide the decision of the national judge in the context of a proportionality assessment. This, by definition, implies balancing the right to liberty against other competing interests. As mentioned above, the competing interest that is consistently weighted against personal liberty is the need to ensure the proper implementation of mutual recognition procedures, or the avoidance of risk of absconding; more generally, ensuring that the person does not escape justice. The willingness of the executing judge to order provisional release pending the execution of an EAW, however, is inevitably dependent on – *inter alia* – the capacity for properly monitoring the person concerned. This, in cases where the executing state is not the state of residence of the suspect, might create situations where the right to liberty is bound to be at a competitive disadvantage against e.g. the risk of absconding and presents one compelling reason for effective implementation of the European Supervision Order.<sup>62</sup>

The finding that the detention in the issuing state post-surrender is not unlawful even if resulting from an invalid EAW, deserves attention. It is possible the decision underlying the invalid EAW would indeed constitute an appropriate legal basis for detention according to the national law in the context of a purely internal situation. The fact remains, however, that the situation is not purely internal, and that detention (potentially in compliance with national law) was premised on a breach of EU law. While surrender cannot be undone, this situation exposes very clearly the risks of a gap in legal protection and lack of remedy – currently existing in EU law – against the enforcement of an invalid EAW.

#### IV.2. THE USE OF THE CHARTER TO OPPOSE EXECUTION

In the previous section, we have addressed the use of the right to liberty as either an aid to interpretation, or in the context of the legality review of national law. Both these scenarios were assessed with specific regard to disruption to the normal implementation of mutual recognition procedures. Now, the attention turns to possible reliance on the right to liberty as a tool to oppose execution of an EAW. These examples have mostly a normative flavour, as they concern cases not specifically covered by the Court's interpretation.

Firstly, the CJEU has developed a two-step test to refuse execution, if the executing judge finds there is a real risk that the person concerned will suffer fundamental rights violations after being surrendered to the issuing state. So far, the Court has articulated the

<sup>62</sup> See, the contribution from AM Neira-Pena, 'The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security' European Papers (European Forum Insight of 4 November 2020) [www.europeanpapers.eu](http://www.europeanpapers.eu) 1493.

test with regards to the prohibition of inhuman treatment<sup>63</sup> and the right to an independent tribunal.<sup>64</sup> It is submitted that, should the executing authority believe there is a real risk of violations of art. 6 CFREU (in any of its aspects) in the issuing state in a way that satisfies the two-step test, that authority should not execute the EAW.

Secondly, there is the requirement to issue an EAW only when it is proportionate to do so. To this end, the Commission's handbook on how to issue an EAW makes clear that a proportionality check before issuing the warrant can reinforce mutual trust between Member States. Therefore, the issuing authority must consider factors such as the seriousness of the offence, the likely penalty imposed or the likelihood of detention in the issuing state. Furthermore, and more importantly, it must be investigated whether other, less coercive but equally effective measures of judicial cooperation might be used instead.<sup>65</sup> At the pre-trial stage, EU law offers the following alternatives: issuing a European Investigation Order (EIO)<sup>66</sup> to hear a suspect (either digitally or in person in another Member State); issuing a European Supervision Order (ESO) for a non-custodial supervision measure. Neither the FD nor the CJEU's case law explicitly provide for a ground for refusing execution based on proportionality. However, by interpreting the FD in light of arts 6 and 52 CFREU as prescribed by the Court, the executing authority could liaise with the issuing authority and invite them to consider one of the less restrictive alternatives, if the circumstances allow.<sup>67</sup>

## V. CONCLUSIONS

This *Insight* has analysed the role for the Charter and the right to liberty in the context of pre-trial detention in EU law. The assessment focused on two scenarios: purely internal situations and mutual recognition procedures. The former scenario has been attracted under the scope of application of EU law by the adoption of a series of directives, establishing common minimum rules on certain aspects of individual rights in criminal proceedings. The *Insight* has shown that the use of art. 6 CFREU in this context has been limited by the rules on the scope of application of the Charter. For national rules implementing provisions of the directives clearly connected to the right to liberty, the Charter could be used by the Court for – most importantly – reviewing the compatibility of those rules with EU law. For other domestic measures, which come in the same area of those EU rules but outside their specific scope, the Charter will not find applica-

<sup>63</sup> Art. 4 CFREU cit.

<sup>64</sup> *Ibid.* art. 47.

<sup>65</sup> Notice C(2017) 335 from the Commission of 6 October 2017, Handbook on how to issue and execute a European arrest warrant 14.

<sup>66</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

<sup>67</sup> Notice C(2017) 335 cit. 29.

tion. While agreeing with the legal reasoning behind the distinction drawn by the Court on this matter, the *Insight* has submitted that a systemic and purposive interpretation might achieve a more balanced approach between the certainty of the scope of application of the Charter, on the one hand, and legal coherence and effectiveness of the directives involved, on the other.

The discussion on cross-border scenarios has shown the existence of a specific role for the right to liberty in situations of prolonged detention pending mutual recognition (EAW specifically) procedures. Notably, art. 6 CFREU has been used to orient the interpretation of executing judges to ensure that detention is not prolonged excessively. It has been observed, however, that the protection offered by such proportionality-driven approach to the right to liberty is undermined by the limited implementation of the European Supervision Order, on the one hand, and by the debatable legal grounds underpinning the refusal to recognise the existence of a right to release. It has been argued that art. 6 CFREU might still come in handy to challenge execution of the EAW, either on proportionality grounds and in favour of less coercive measures of mutual recognition, or (in exceptional circumstances) in case of a real risk that the right to liberty will be violated in the issuing state.



